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Supreme Court, U.S.
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No. 95-1216

In The

Supreme Court of the United States

October Term, 1995

DENNIS COOK, TONI COOK, JEFFREY BRIAN COOK AND JENNIFER ROSE SMITH,

Petitioners,

v.

CITY OF CINCINNATI, RONALD FLENDER AND DAVID WADDELL,

Respondents.

Petition For Writ Of Certiorari To The Hamilton County Court Of Appeals First Appellate District Of Ohio

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether in an action brought under 42 U.S.C. Section 1983, municipal Police Officers are entitled to qualified immunity where Petitioners failed to demonstrate that the officers violated any "clearly established" constitutional rights.

2. Whether in an action brought under 42 U.S.C. Section 1983, a municipal Police Officer's entitlement to qualified immunity is purely a legal issue to be decided by the trial court as a matter of law.

3. Whether in an action brought under 42 U.S.C. Section 1983, where Petitioners fail to produce evidence of a policy or custom on the part of a municipality with respect to alleged civil rights violations, the municipality is entitled to judgment as a matter of law.

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STATEMENT OF THE CASE

On April 5, 1986, Petitioner Dennis Cook was protesting against abortion outside the Margaret Sanger Center, a medical facility located in Cincinnati, Ohio. He was accompanied by his children, Jeffrey Cook and Jennifer Smith, who were ages 10 and 11, respectively, at the time.

On the morning of April 5, the City of Cincinnati Police Division received a radio dispatch to investigate a complaint of disorderly conduct at the Sanger Center. (Resp. App. 7A). Police Officer David Waddell responded to the call. When Officer Waddell arrived at the scene, Dennis Cook was standing on the property of the Sanger Center directing words of protest very loudly at the Center. (Resp. App. 8A-9A). Officer Waddell repeatedly asked Mr. Cook to remove himself from Center property and to behave in a more orderly fashion. (Resp. App. 9A). Mr. Cook refused to comply with Officer Waddell's requests. (Resp. App. 9A).

Police Sergeant Ronald Flender arrived at the Sanger Center a short time after Officer Waddell. The officers summoned Dennis Cook away from the Center and into an adjacent parking lot, where they informed him that they were going to issue a citation for disorderly conduct. (Resp. App. 9A). Cook continued to behave in a disorderly manner, screaming words of protest directly at the officers. (Resp. App. 9A). The officers thereafter decided that it would be prudent to remove Mr. Cook from the premises and informed him that he was under arrest. (Resp. App. 9A).

Prior to removing Mr. Cook from the scene, Sergeant Flender ordered Officer Waddell to take necessary measures to ensure the safety of Cook's children. (Resp. App. 11A). Debra Jackson, an employee at the Sanger Center, witnessed Dennis Cook speaking to Barbara Desborough, a fellow protester with whom Dennis Cook was apparently acquainted. (Resp. App. 10A-11A). Mr. Cook made arrangements with Ms. Desborough to take care of the children. (Resp. App. 11A). Mr. Cook was then taken to police headquarters where he was formally charged with disorderly conduct. Mr. Cook was subsequently acquitted of that charge.

On April 3, 1987; Petitioners Dennis Cook, Toni Cook, Jennifer Smith and Jeffrey Cook filed a Complaint against Respondents City of Cincinnati, Ronald Flender and David Waddell in the Hamilton County Court of Common Pleas. The Complaint was later amended. Petitioners alleged that Respondents had deprived them of their constitutional rights under 42 U.S.C. Section 1983 and that Respondents had committed various intentional torts under state law.

Respondents filed a Motion for Summary Judgment on January 22, 1992. On February 22, 1992, the summary judgment proceedings were stayed to permit discovery. Petitioners filed a Memorandum in Opposition to Respondents' Motion for Summary Judgment on January 22, 1993.

The trial court entered judgment in favor of Respondents on all counts in an Entry filed November 2, 1993. (Pet. App. 19a-21a). The trial court held in part that the Respondent Police Officers, who were being sued under

42 U.S.C. Section 1983, were qualifiedly immune since their actions relating to the constitutional claims asserted by Respondents were taken while acting in their official capacities as Cincinnati Police Officers, and their actions did not constitute violations of clearly established law on the dates those actions were taken. Likewise, the trial court held the actions of the City of Cincinnati did not rise to the level of constitutional violations. (Pet. App. 20a).

On November 17, 1993, Petitioners filed a Notice of Appeal to the Court of Appeals, First Appellate District, Hamilton County, Ohio. Following briefing and oral argument, the Court of Appeals affirmed the judgment of the trial court on May 31, 1995. (Pet. App. 5a-18a). The Court of Appeals held relevant to the federal constitutional claims: 1) Cook's claims that in April, 1986, Flender and Waddell while acting under color of law violated his clearly established federal rights under the First and Fourteenth Amendments must fail, the officers were entitled to qualified immunity and summary judgment was properly granted to Flender and Waddell on Cook's 1983 claims (Pet. App. 13a-14a); 2) Cook and his children failed to establish a violation of clearly existing laws on his Fourteenth Amendment claims and summary judgment was properly granted to Waddell and Flender on that issue (Pet. App. 14a-15a); and 3) since Cook failed to establish any violation of his constitutional rights by the Police Officers, there was no basis on which to find a Section 1983 violation by the City and the trial court properly granted summary judgment to the City. (Pet. App. 15a).

On July 17, 1995, Petitioners filed a Memorandum in Support of Jurisdiction in the Supreme Court of Ohio, to which Respondents replied by Memorandum in Opposition to Jurisdiction on August 16, 1995. On November 1, 1995, by Entry, the Ohio Supreme Court declined jurisdiction to hear the case and dismissed the appeal as not involving any substantial constitutional question. (Pet. App. 4a).

SUMMARY OF ARGUMENT

With respect to individual Police Officers Flender and Waddell, Petitioners brought federal claims for violations of rights under the First, Fourth and Fourteenth Amendments. The trial court granted qualified immunity to Officers Flender and Waddell. The Court of Appeals correctly affirmed this decision because Petitioners failed to establish violation of a clearly existing federally protected right at the time of Dennis Cook's arrest.

The issue of qualified immunity may not be characterized as a disputed factual issue. The Court of Appeals correctly affirmed the trial court's determination of the issue as a matter of law.

With respect to the City of Cincinnati, where Plaintiffs fail to produce evidence of a policy or custom on the part of a municipality with respect to alleged civil rights violations, the municipality is entitled to judgment as a matter of law. Here, Petitioners failed to establish a Section 1983 claim against the City because there was no showing that any act of the City employees constituted a

violation of their civil rights. Absent such a showing, there is no liability by the City.[1]

ARGUMENT

1. **Where Petitioners did not demonstrate that Police Officers Flender and Waddell violated any "clearly established" constitutional rights, the officers are entitled to immunity under 42 U.S.C. Section 1983.**

2. **Officers Flender's and Waddell's entitlement to qualified immunity under 42 U.S.C. Section 1983 for their actions in arresting Dennis Cook is a legal issue to be decided by the trial court as a matter of law.**

Because the first and second arguments for denying certiorari are factually and legally interwoven, they will be addressed together.

Pursuant to Rule 56 of the Ohio Rules of Civil Procedure, a motion for summary judgment is to be granted by the trial court where the record indicates that there is no genuine issue as to any material fact, that the moving party is entitled to judgment as a matter of law, and that

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[1] In their Questions Presented, Petitiners do not specifically address liability of the City of Cincinnati. (Petition for Writ of Certioriari, p. i). The Petitioners merely "suggest that should this Court accept jurisdiction and remand this case for trial, the municipal liability issue should be remanded along with the merits of the constitutional issues." (Petition for Writ of Certioriari, p. 4).The City of Cincinnati is herein, however, addressing its potential liability to demonstrate the frivolous nature of Petitioners' claims against it.

reasonable minds can come to but one conclusion, and that conclusion is adverse to the party against whom the motion for summary judgment is directed, that party being entitled to have the evidence construed most strongly in his favor. (Pet. App. 3a); and *Harless v. Willis Day Warehousing Co.*, Ohio St. 2d 64, 375 N.E.2d 46 (1978). The record below indicates that Respondents were entitled to summary judgment as to all of Petitioners' federal claims.

Petitioners contend that the Court of Appeals erred in finding that Officers Waddell and Flender were entitled to immunity. This Court has held that public officials performing discretionary functions are generally shielded from liability for damages if their conduct does not violate "clearly established" constitutional rights of which a reasonable person would have known. *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). This Court has further held that in order to defeat this qualified immunity, the constitutional right alleged to have been violated must be sufficiently particularized that the unlawfulness of the public official's conduct is apparent. *Anderson v. Creighton*, 483 U.S. 635 (1987). In *Anderson*, this Court held that if based upon the particular circumstances a Police Officer could reasonably have believed his actions to be lawful, he is entitled to immunity even though he was mistaken in his conclusion.

In *Malley v. Briggs*, 475 U.S. 335, 341 (1986), this Court further clarified the contours of qualified immunity when it ruled that Police Officers should be entitled to qualified immunity from suit unless on an objective basis, it is obvious that no reasonably competent Police Officer would have concluded that his conduct was lawful; but if

officers of reasonable competence could disagree on the issue, immunity should be conferred. Thus, the doctrine of qualified immunity turns upon what rights were "clearly established" at the time of the officer's action and therefore involves a question of law for the court.

The conclusion that qualified immunity is purely a question of law has been repeatedly confirmed by this Court and the Sixth Circuit Court of Appeals. The Sixth Circuit has recognized that while qualified immunity from suit must be asserted, when it is raised, the *court* must determine whether certain acts when committed violated clearly established federal law. *See Dominique v. Telb*, 831 F.2d 673, 677 (6th Cir. 1987). Once this issue is injected into a case through a motion to dismiss or a motion for summary judgment, the Plaintiff is obliged to present facts which if true constitute a violation of clearly established law. *Id.* at 677; and *Mitchell v. Forsyth*, 472 U.S. 511 (1985). In any event, it has been held that resolution of the issue of qualified immunity is purely a matter of law for determination by the court and cannot be characterized as a disputed factual issue. *Dominique*, 831 F.2d at 677. *See also, Donta v. Hooper*, 774 F.2d 716, 719 (6th Cir. 1985), *cert. denied*, 483 U.S. 1019 (1987) (officers' entitlement to qualified immunity "is purely a legal question to be determined by the trial judge prior to trial").

Once a Defendant raises the issue of qualified immunity, the burden shifts to the Plaintiff to establish that the Defendant violated a clearly established right of which a reasonable public official would have known. *Dominique*, 831 F.2d at 673. This burden upon the Plaintiff to demonstrate that the Defendant violated a "clearly established" right entails more than a mere invocation of a general

right, e.g., a claim that the Plaintiff's First Amendment rights were violated. It requires a fact-specific showing that the right was clearly established at the time of the official's actions. *Mitchell*, 472 U.S. at 511.

In this case, Petitioners utterly failed to establish a violation of clearly established constitutional rights. They cite numerous cases for the proposition that a person has the right to express his views in a public forum, and Respondents do not challenge that such a right exists. This assertion, however, is not dispositive.

Here, Dennis Cook was on the property of the Sanger Center, was shouting loudly at the employees and clients of the Center, and was acting in such manner as to reasonably cause Officers Waddell and Flender to fear for their safety. Cook repeatedly screamed words of protest at the officers in an attempt to make it seem as if the officers were responsible in some way for the actions of the Sanger Center.

Petitioners concede that reasonable time, place and manner restrictions may be placed upon expressive activities. *See U.S. v. Grace*, 461 U.S. 171 (1983). Dennis Cook's conduct in the instant case clearly cried out for some measure of restriction. The officers attempted to convince Dennis Cook to protest in a peaceful manner, and their attempts failed. Only after Cook became completely uncontrollable did the officers decide to arrest him. Under these circumstances, the actions of the officers were reasonable and did not violate Dennis Cook's "clearly established" First Amendment rights.

Petitioners also claim that Dennis Cook's Fourth and Fourteenth Amendment rights were violated by his arrest

and the subsequent charge of disorderly conduct. For the same reasons cited above, these claims must fail. It is clear that Cook's conduct provided probable cause to arrest him. In the context of civil claims in Ohio, probable cause has been defined as "[a] reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the person accused [was] guilty of the offense with which he [was] charged." *McFinley v. Bethesda Oak Hosp.*, 79 Ohio App. 3d 613, 617, 607 N.E.2d 936, 938 (1st Dist. Ohio 1992), *quoting Huber v. O'Neill*, 66 Ohio St. 2d 28, 30, 419 N.E.2d 10, 12 (1981).

In this case, Dennis Cook was arrested for, and charged with, a violation of Ohio Revised Code Section 2917.11, which provides in relevant part the following:

> (A) No person shall recklessly cause inconvenience, annoyance, or alarm to another, by doing any of the following:
>
> * * *
>
> (2) Making unreasonable noise or offensively coarse utterance, gesture, display, or communicating unwarranted and grossly abusive language to any person.

Ohio Rev. Code Ann. §2917.11. (Resp. App. 16A). Dennis Cook's unruly behavior in connection with his protest activities, as described above, provided an ample basis upon which the officers could have believed that he was guilty of the charged offense.

In fact, the presence of probable cause was established in the criminal proceedings relating to the charge. At the close of evidence in the criminal trial, the defense

moved for dismissal pursuant to Criminal Rule 29, which motion was denied. Criminal Rule 29 provides that the Defendant must be acquitted "if the evidence is insufficient to sustain a conviction" of an offense. *Ohio R. Crim. P.* 29. (Resp. App. 17A). Thus, if a court denies a Rule 29 motion, it is a determination that the evidence is sufficient to support a conviction for the offense charged. *State v. Bridgeman*, 55 Ohio St. 2d 261, 381 N.E.2d 184 (1978); and *State v. Jenks*, 61 Ohio St. 3d 159, 574 N.E.2d 492 (1991).

A comparison of the Ohio standard relating to a Rule 29 motion for acquittal and that for probable cause reveals that the Rule 29 standard requires a greater evidentiary basis. Therefore, if a Rule 29 motion is denied, it is an implicit finding that probable cause existed for the charged offense. Such a finding in a criminal trial has been held to be conclusive as to the question of probable cause in a civil rights action brought under 42 U.S.C. Section 1983. *See Coogan v. Wixom*, 820 F.2d 170 (6th Cir. 1987). In effect, Petitioners are collaterally estopped from asserting that probable cause did not exist for the arrest and subsequent charge in this case. Petitioners' Fourth Amendment claims must therefore fail.

Petitioners also contend that their substantive due process rights under Section 1983 were violated by police conduct that "shocks the conscience." *See Rochin v. California*, 342 U.S. 165 (1952). Specifically, their claim that the arrest and the alleged abandonment of the minor children constituted misconduct so shocking that it gave rise to Section 1983 liability.

Having demonstrated that the arrest and charges were proper, Respondents need not dwell on the fact that this conduct was not sufficiently shocking so as to render the officers liable. Further, even were Respondents to concede that the minor children were left unattended (which Respondents do not), there is still no basis for Section 1983 liability as the "shocks the conscience" standard has been abandoned. In *Braley v. City of Pontic*, 906 F.2d 220 (6th Cir. 1990), the Sixth Circuit noted that the standard had been formerly applied only to cases involving excessive force, which is not an issue in this case. The court went further, moreover, and stated that the doctrine had been rejected by the United States Supreme Court and would no longer be recognized in the Sixth Circuit. *Id.* at 220. Petitioners therefore can claim no error on the part of the Court of Appeals in refusing to find liability on that basis.

Further, Petitioners cannot recover for the alleged violation of the children's civil rights, as Officers Waddell and Flender owed no affirmative duty to protect the children in this case. In *DeShaney v. Winnebago Cty. Dept. of Social Services*, 489 U.S 189, 196 (1989), this Court emphasized that there is no affirmative constitutional right to governmental protection. This Court further held that if a governmental actor was not required to provide aid, the governmental actor could not be held liable for injuries that could have been averted if aid had been provided. *Id.* at 1004. That holding is applicable herein. Dennis Cook's children have no claim as a matter of law for the alleged failure of the individual defendants to make arrangements to protect them after their father's arrest. Thus, the trial court correctly granted summary judgment in favor of Officers Waddell and Flender.

3. Where the Petitioners failed to produce evidence of a policy or custom on the part of the City of Cincinnati with respect to alleged civil rights violations, the City is not liable to Petitioners as a matter of law.

Petitioners failed to establish a Section 1983 claim against the City of Cincinnati because there was no showing that any act of the City employees constituted a violation of their civil rights. Absent such a showing, there of course can be no liability on the part of the City.

Moreover, even if the court below had accepted that the actions of Officers Flender and Waddell constituted a violation of Petitioners' civil rights, such a showing would be insufficient for liability to attach to the City. It is firmly established that Section 1983 liability does not attach to a municipality upon the same principles as the common law doctrine of respondeat superior. Rather, liability can attach only where the action underlying the Plaintiff's claim was carried out pursuant to an official policy or custom of the municipality. *Monell v. Dept. of Social Services*, 436 U.S. 658, 690-691 (1978); and *Pesek v. City of Brunswick*, 794 F. Supp. 768, 789 (N.D. Ohio 1992).

The courts have repeatedly emphasized that it is only "when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible." *Meyers v. City of Cincinnati*, 14 F.3d 1115, 1117 (6th Cir. 1994), *quoting Monell*, 436 U.S. at 694. In *Meyers*, the court held that in the organizational structure of the City of Cincinnati, a policy or custom may be established only by

the City's "highest officials," such as the Safety Director, the City Manager, or the Civil Service Commission. *Meyers*, 14 F.3d at 1117.

In this case, Petitioners failed to adduce any evidence as to any custom or policy on the part of the City with respect to the claimed civil rights violations. Furthermore, with respect to the alleged animus on the part of the City concerning abortion protesters, Petitioners failed to point to any action of the City's policymakers, as defined in *Meyers* and other cases, that would support their claim. Similarly, there is no evidence in the record that it is a City policy or custom to leave children unattended when their parents have been arrested. Therefore, the trial court correctly granted summary judgment in favor of the City as to the Section 1983 claims.

CONCLUSION

For the foregoing reasons, Petitioners have not demonstrated any error in the judgment of the Court of Appeals. Based on the facts in the record, the individual Respondent Police Officers did not violate any clearly established rights of the Petitioners and were therefore entitled to immunity under 42 U.S.C. Section 1983. Further, the City was properly found to be not liable under Section 1983 as Petitioners failed to prove that any of the acts in question were the product of a policy or custom of the City.

For the foregoing reasons, Respondents respectfully request that the Petition for Writ of Certiorari be denied.

Respectfully Submitted,

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APPENDIX A

COURT OF COMMON PLEAS

HAMILTON COUNTY, OHIO

DENNIS J. COOK, et al., Plaintiffs,	:	CASE NO. A8702588
vs.	:	
CITY OF CINCINNATI, Defendant.	:	

SWORN STATEMENT

OF

DEBRA LEE JACKSON

Taken by Donald E. Hardin, Esq., at Cincinnati Women's Services, 950 Nassau Street, Cincinnati, Ohio, at 10:50 a.m., Wednesday, April 7, 1993.

APPEARANCES:

Debra Lee Jackson

Donald E. Hardin, Esq.

Julie F. Bissinger, Esq.

Patricia A. Walterman, RPR, Court Reporter-Notary Public

[p. 3] DEBRA LEE JACKSON

having previously been sworn, was interrogated at the within stated address and answered as follows:

EXAMINATION

BY MR. HARDIN:

Q. Would you state your name for the record, please?

A. My name is Debra Lee Jackson.

Q. And your business address?

A. 950 Nassau Street.

Q. Cincinnati Ohio?

A. Cincinnati, 45206.

Q. What is your job description?

A. Currently, I am the administrative director of Cincinnati Women's Services.

Q. And how long have you been in that position?

A. Five years.

Q. Prior to the time of that assignment, did you have another assignment or job?

A. Yes. Before that I was employed by the National Abortion Rights Action League as a Cincinnati office coordinator.

Q. On or about April 5, 1986, what was your job?

A. Well, I was a volunteer for Planned Parenthood.

[p. 4] Q. And where did you work as a volunteer?

A. I worked as the head escort for Planned Parenthood at their 3332 Vine Street location where they provided abortion services.

Q. Is that also known as the Margaret Sanger Center?

A. Yes, it was at that time.

Q. Were you on duty on the morning of April 5, 1986?

A. Yes, I was.

Q. And on that date did you have an occasion, around 10:00 or 10:30 in the morning, to observe a person by the name of Dennis Cook?

A. Yes, I did.

Q. Did you know Mr. Cook prior to that date?

A. Yes. He was a regular picketer in front of that facility.

Q. So you knew him by description, by name?

A. Yes.

Q. Do you know whether or not Mr. Cook had any children with him on that day?

A. That particular morning he did. I could not have sworn which children were his, but two children did arrive with him.

[p. 5] Q. What did you see Mr. Cook do as you were working at the Margaret Sanger Center on the morning of April 6th, 1986?

A. Mr. Cook was becoming louder and louder in his vocal screaming, if you will. He would move from the sidewalk up into the lawn area, actually on Planned Parenthood property, yelling louder and louder through the front window, which was the waiting room.

Q. What type of front window did you have?

A. It was a large bay window.

Q. What was it made out of?

A. Casement window with small panes of glass, but making a large window.

Q. And where were you when you first heard Mr. Cook?

A. I was on the front lawn escorting patients into the facility.

Q. Did you have any conversations with Mr. Cook?

A. Yes. As Mr. Cook became louder, and I realized by going into the building, we could hear him inside the building, it was disturbing patients. I went back outside and asked him to please lower his voice and to please move back onto the sidewalk to public property.

Q. Before you told him to lower his voice, did you [p. 6] go to any particular portions of the clinic to see whether you could hear him?

A. Well, when he didn't move back onto the sidewalk and when he would not lower his voice, I again went into the clinic. He – the more I talked to him, the more upset he seemed to be and the louder he became, so I went beyond the waiting room, back down the hallway

and into each procedure room, all the way into the back of the building, went into each room to see what could be heard, and because his voice would carry down the small alley between this building and the apartment building next door, he could be heard in every single room of the building.

Q. Did you ever go into any rooms that did not have windows?

A. Yes, yes, into the small bathroom facility, and with the door shut you could still hear his voice.

Q. And were the doors to the clinic open or closed at that time?

A. The doors were closed, and there were two doors.

Q. Were any of the windows open?

A. No, no.

Q. So, you could hear him inside with all the doors and windows closed?

[p. 7] A. Absolutely.

Q. Could you clearly hear the types of things he was saying?

A. Yes. What he would scream was what he often screamed: "Mommy, don't kill me. Don't kill your baby." And that could be heard very clearly.

Q. Were there people in the various procedure rooms at the time that screaming was going on?

A. Yes, services were being provided, and all those rooms were being utilized.

Q. Can you tell me the general reaction to the screaming from the people who were having procedures performed?

A. Patients were upset. They were frightened, because this did not seem to be someone who was calm and collected. This was somebody they could not trust. When you were in a procedure room, it sounded as if – the way the sound would reverberate off the walls in this small alley, it sounded like he was right outside the window. It was very disconcerting to staff and patients alike.

Q. Did you see anyone upset to the point of tears?

A. Yes, there were patients in the waiting room crying and very upset. He was right outside that window.

Q. Did you finally take any action with respect to [p. 8] it, other than talking to Mr. Cook?

A. Well, yes, it was clear he was not going to honor my request, so I called the Cincinnati Police.

Q. During the time that you observed the people inside the clinic, either the people who came for services or the staff, did you ever see anybody provoked to such a point of violence or suggested violence?

A. Well, people who would come with patients. It was rare to have a patient who would be upset enough to do that, but you would have husbands, boyfriends, sometimes even a mother of a minor or two would become so upset that we would often physically have to restrain them as we were escorting them into the building. But on this particular day when it was so disturbing inside the building, we had several people I had to ask to please sit

down, that going outside was not going to do anything but cause a problem.

Q. Did they indicate they were going to take physical action against him?

A. They gave me that impression, yes.

Q. You restrained them from doing that?

A. I asked them to please stay inside the building.

Q. And they did that?

A. They did honor my request.

[p. 9] Q. Did you at any time call the Cincinnati Police?

A. Yes, I did.

Q. You were the one who made the complaint?

A. Yes, I was.

Q. What complaint did you make?

A. I simply described the situation, that we had a protester that continued to move up onto our property and right in front of the window, and was screaming so loudly that it was a real problem inside the facility.

Q. How wide is the – or was the yard area, the grassy area from the front of the clinic down to the edge of the sidewalk?

A. To the best of my recollection, and this isn't my best thing to do, is to measure by sight, but I would say it was no more than between 12 and 15 feet.

Q. How close to the building, in the front, at least, would you say Mr. Cook was when he was shouting and screaming?

A. There was a row of actual bushes in front, and he would get as close to the building as he could, so I would say within three or four feet.

Q. So, he clearly was on your property?

A. Yes.

Q. Did the police arrive?

[p. 10] A. Yes, they did.

Q. Were there one or two officers in the beginning?

A. To be honest, with 150 people on the sidewalk, I couldn't swear to you how many. It wasn't until a police officer moved to the front of the crowd that I could see anything.

Q. Did you report to him what was going on?

A. Yes. He asked for the person who made the call, and I talked to him.

Q. Did you see him talk to Mr. Cook?

A. Yes, I did.

Q. Where was Mr. Cook when the officer talked to him?

A. The officer was on the sidewalk and Mr. Cook was standing up in the yard close to the building.

Q. And you say there was 150 people out in front?

A. At least.

Q. Were they in any way making any sort of sounds?

A. Yes, they were chanting and screaming, and when any police officer would arrive, they would start yelling and shouting.

Q. But could you hear Mr. Cook over and above all that?

[p. 11] A. Absolutely. Absolutely.

Q. How long did this go on from Mr. Cook, from the time that you initially voiced a complaint to him and until, maybe, the police officer arrived?

A. I would say approximately a half an hour, to the best of my memory.

Q. After the police officer arrived, did you still observe Mr. Cook screaming and shouting?

A. Yes. He seemed to be even more fired up than before.

Q. Did you finally see any action taken by any member of the Cincinnati Police Division?

A. Yes, I did.

Q. What was that?

A. Well, at which point the officers requested that Mr. Cook step onto the sidewalk and they informed him that he was going to be arested.

Q. Do you recall whether the word was "cited" or "arrested"?

A. I honestly couldn't tell you.

Q. Did Mr. Cook then desist in his conduct or did he continue it?

A. No. There seemed to be a problem with – he was calling to one of his children. I was probably, at this [p. 12] point, at least ten or 15 feet away, up on the steps, because the crowd had moved in, so a lot of things I wasn't able to hear, even if I wanted to. Only when Mr. Cook would scream could I hear anything clearly, but he was calling to one of his children to get something for him.

Q. And did that child then leave the area?

A. Seemed to. It was very hard for me to see.

Q. Did Mr. Cook stop the screaming and shouting at that point?

A. No. He continued in his behavior.

Q. Did you ever, after that point, see the child return?

A. Yes. I really could only see the children clearly as they were leading Mr. Cook away to a patrol car and he shouted for a person to take care of his children.

Q. Do you know who the person he shouted to was, his identity?

A. There was a large crowd, but the person who was closest to the child and the person who then yelled back that would take care of him was a woman named Ms. Desborough.

Q. Is that Barbara Desborough?

A. Yes.

Q. You're sure of that?

[p. 13] A. Yes.

Q. Before the police left, there was somebody that acknowledged the children and said they would take care of them?

A. Absolutely.

Q. Did you see anything other than that occur on that day?

A. Yes, the other thing I saw was a protester named Michael Meyer go over to the children of Mr. Cook and tell them that they were arresting his father, and "Look at those police officers, they're arresting your father," which prompted the children to say, "Don't arrest my Daddy. Don't take my Daddy away."

Q. Were there television cameras out there at the time?

A. On that particular day I can't honestly remember whether there were or not. They may have been. They were there almost every Saturday.

Q. Was Ms. Desborough right there with the children at that time –

A. Yes, she was right there.

Q. – when Meyer came?

A. On the sidewalk.

Q. He's the one that said, they're arresting them, [p. 14] and that's what prompted these children to start crying?

A. Yes.

Q. Do you recall anything else that occurred on that day?

A. When the children started to cry, they were trying to run to their father in the police car and the people were restraining them. Once they put Mr. Cook in the car, the crowd was very angry, but they calmed down after that, and I couldn't see what happened to the children after that.

Q. Did you feel at any time these police officers abandoned the children?

A. No. They hesitated when he said, "What about my kids," but when Ms. Desborough said, "I've got them, they're okay, Dennis," the officers continued, and Mr. Cook did not hesitate and the officers got in the car and they pulled away.

MR. HARDIN: I don't have any further questions.

MS. BISSINGER: No questions.

MR. HARDIN: We will have a transcript of this made up and we're going to order it expedited overnight, or whatever the fastest is, so we'll get it back to you for you to review and sign.

[p. 13] THE WITNESS: Okay.

MR. HARDIN: Thank you.

/s/ Debra Lee Jackson
DEBRA LEE JACKSON

SWORN STATEMENT CONCLUDED AT 11:05 A.M.

CERTIFICATE

STATE OF OHIO :
: SS
COUNTY OF HAMILTON :

I, Patricia A. Walterman, RPR, the undersigned, a duly qualified and commissioned notary public within and for the State of Ohio, do hereby certify that before the giving of her aforesaid deposition, DEBRA LEE JACKSON was by me first duly sworn to depose the truth, the whole truth and nothing but the truth; that the foregoing fifteen (15) pages is the sworn statement given at said time and place by the said DEBRA LEE JACKSON; that said sworn statement was taken by me in stenotype and transcribed into typewriting by me; that the transcribed sworn statement was submitted to the witness for her examination and signature; that I am neither a relative of nor attorney for any of the parties to this cause, nor relative of nor employee of any of their counsel, and have no interest whatever in the result of the action.

IN WITNESS WHEREOF, I hereunto set my hand and official seal of office at Cincinnati, Ohio, this 7th day of April, 1993.

/s/ Patricia A. Walterman
Patricia A. Walterman, RPR
Notary Public – State of Ohio.

My commission expires:
July 30, 1997.

APPENDIX B

§2917.11 Disorderly conduct.

(A) No person shall recklessly cause inconvenience, annoyance, or alarm to another, by doing any of the following:

(1) Engaging in fighting, in threatening harm to persons or property, or in violent or turbulent behavior;

(2) Making unreasonable noise or offensively coarse utterance, gesture, or display, or communicating unwarranted and grossly abusive language to any person;

(3) Insulting, taunting, or challenging another, under circumstances in which such conduct is likely to provoke a violent response;

(4) Hindering or preventing the movement of persons on a public street, road, highway, or right-of-way, or to, from, within, or upon public or private property, so as to interfere with the rights of others, and by any act which serves no lawful and reasonable purpose of the offender;

(5) Creating a condition which is physically offensive to persons or which presents a risk of physical harm to persons or property, by any act which serves no lawful and reasonable purpose of the offender.

(B) No person, while voluntarily intoxicated shall do either of the following:

(1) In a public place or in the presence of two or more persons, engage in conduct likely to be offensive or to cause inconvenience, annoyance, or alarm to persons

of ordinary sensibilities, which conduct the offender, if he were not intoxicated, should know is likely to have such effect on others;

(2) Engage in conduct or create a condition which presents a risk of physical harm to himself or another, or to the property of another.

(C) Violation of any statute or ordinance of which an element is operating a motor vehicle, locomotive, watercraft, aircraft, or other vehicle while under the influence of alcohol or any drug of abuse, is not a violation of division (B) of this section.

(D) When to an ordinary observer a person appears to be intoxicated, it is probable cause to believe such person is voluntarily intoxicated for purposes of division (B) of this section.

(E) Whoever violates this section is guilty of disorderly conduct, a minor misdemeanor, except that if the offender persists in disorderly conduct after reasonable warning or request to desist, or if the offender is within one thousand feet of the boundaries of any school, school premises, or school building disorderly conduct is a misdemeanor of the fourth degree.

(F) As used in this section, "school," "school premises," and "school building" have the same meanings as in section 2925.01 of the Revised Code.

Ohio Rev. Code Ann. § 2917.11

APPENDIX C

Rule 29. Motion for Acquittal.

(A) Motion for judgment of acquittal. The court on motion of a defendant or on its own motion, after the evidence on either side is closed, shall order the entry of a judgment of acquittal of one or more offenses charged in the indictment, information, or complaint, if the evidence is insufficient to sustain a conviction of such offense or offenses. The court may not reserve ruling on a motion for judgment of acquittal made at the close of the state's case.

(B) Reservation of decision on motion. If a motion for a judgment of acquittal is made at the close of all the evidence, the court may reserve decision on the motion, submit the case to the jury and decide the motion either before the jury returns a verdict, or after it returns a verdict of guilty, or after it is discharged without having returned a verdict.

(C) Motion after verdict or discharge of jury. If a jury returns a verdict of guilty or is discharged without having returned a verdict, a motion for judgment of acquittal may be made or renewed within fourteen days after the jury is discharged or within such further time as the court may fix during the fourteen day period. If a verdict of guilty is returned, the court may on such motion set aside the verdict and enter judgment of acquittal. If no verdict is returned, the court may enter judgment of acquittal. It shall not be a prerequisite to the making of such motion that a similar motion has been made prior to the submission of the case to the jury.

Ohio R.Crim.P. 29